

## SECURITIES AND EXCHANGE COMMISSION,

V.

Defendant.

Civil Action No.: 3-08-CV2050-D

Plaintiff Securities and Exchange Commission respectfully requests that the Court alter or amend its judgment in accordance with Federal Rule of Civil Procedure 59(e). Specifically, the Court should alter or amend the judgment to remove the provision taxing costs against Plaintiff. As a matter of law, costs cannot be assessed against the SEC.

On July 17, 2009, the Court issued its Memorandum Opinion and Order, dismissing the SEC’s case but granting permission to replead. On August 12, 2009, the SEC timely filed a “Notice and Request Pursuant to the Court’s July 17, 2009 Memorandum Opinion and Order,” respectfully requesting that that “the Court enter the final judgment against it to initiate the time for consideration of an appeal.” On August 13, the Court entered its Judgment. The Judgment provides in part: “Cuban’s costs of court, as calculated by the clerk of court and to the extent allowable under 28 U.S.C. § 1920, are taxed against Plaintiff.”

## II. MEMORANDUM OF LAW

The Securities Exchange Act of 1934 prohibits the award of costs against the SEC in a civil enforcement action. Section 27 of the Exchange Act [15 U.S.C. § 78aa] provides: “No costs shall be assessed for or against the Commission in any proceeding under this [chapter or subchapter] brought by or against it in the Supreme Court or [the district courts].” (emphasis added); *see SEC v. Independence Drilling Corp.*, 595 F.2d 1006, 1008 (5<sup>th</sup> Cir. 1979) (reversing district court’s award of costs of receivership against SEC, noting that section 27 of the Exchange Act bars the assessment of costs against the Commission, and further stating that an award of costs against an agency of the United States is contrary to the doctrine of sovereign immunity); *see also United States v. Idaho*, 508 U.S. 1, 8 (1993) (a specific waiver of sovereign immunity is required before the government may be held liable for “monetary exactions,” and award of costs is the sort of monetary exaction that is barred by sovereign immunity); *John Doe # 1 v. Veneman*, 380 F.3d 807, 821, n. 55 (5<sup>th</sup> Cir. 2004) (reaffirming principle that waiver of sovereign immunity must be “specific”).

### III. CONCLUSION AND REQUEST FOR RELIEF

Because the award of costs against the SEC is prohibited by statute and sovereign immunity, Plaintiff respectfully requests that the Court alter or amend the judgment to remove the provision taxing costs against Plaintiff.

August 13, 2009

Respectfully submitted,

Toby M. Galloway  
Texas Bar No. 00790733  
Securities and Exchange Commission  
Burnett Plaza, Suite 1900  
801 Cherry Street, Unit 18  
Fort Worth, TX 76102  
(817) 978-6447  
(817) 978-2700 (fax)

s/ Kevin P. O'Rourke  
Kevin P. O'Rourke (D.C. Bar No. 254920)  
Julie M. Riewe (D.C. Bar No. 472470)  
Adam S. Aderton (D.C. Bar No. 496247)  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549  
(202) 551-4442 (O'Rourke)  
(202) 772-9246 (fax) (O'Rourke)  
orourkek@sec.gov

*Attorneys for Plaintiff  
Securities and Exchange Commission*

### CERTIFICATE OF CONFERENCE

I certify that on August 13, 2009, I conferred with Kip Mendrygal, one of the attorneys for Mr. Cuban, regarding the merits of this motion. Mr. Mendrygal stated that Mr. Cuban does not oppose the relief sought in this motion.

s/ Toby M. Galloway  
Toby M. Galloway

**CERTIFICATE OF SERVICE**

I hereby certify that on August 13, 2009, I electronically filed the foregoing document with the Clerk of the Court for the Northern District of Texas, Dallas Division, by using the CM/ECF system which will send notification of such filing to all CM/ECF participants and counsel of record.

*s/ Kevin P. O'Rourke*

Kevin P. O'Rourke